

# The CURE

## Contract User's Resource for Excellence

*The "CURE" is a quarterly newsletter of the State Controller's Office*

Volume 4, Issue 2

April 1, 1998

### News From The SCO

#### A State Controller's Office Update

by JOHN IVY, SCO

#### ⇒ Peer Assessments

The State Controller's Office (SCO) has begun conducting peer assessments of the contracting function at state agencies. If your agency is scheduled for a peer assessment, please keep in mind that a peer assessment, unlike an audit, is focused at a specific function within an agency, and not at the agency itself. Normally, the peer assessment will not involve anyone above the level of the State Controller's signature delegate.

At the completion of the assessment, a report is issued, not to the agency, but to the State Controller. The State Controller will then write a memorandum to the agency's delegate outlining the results of the assessment and attaching a copy of the report.

If your agency is scheduled to have a peer assessment conducted of its state contracting function, please view it as an opportunity to visit with knowledgeable staff, discuss policies and procedures, have questions answered, and improve the state contracting process within your agency.

#### ⇒ State Contracting Training

The CCIT Training Working Group has been meeting with Brad Mallon, the State Training Coordinator, to develop a new course, State Contracting. The course outline closely follows Chapter 6 of the *State Contracting and Procedures Manual*. Like the Contract Management Training course, the new course will be one full day of training. A notebook will be provided at the training and copies of the *Manual* will be avail-

able to assist the participants as they work through the contracting exercises. Look for the course to be available in the Fall of 1998.

The course is on the agenda for the April CCIT meeting and will be discussed in detail.

### Corrections to the Manual

by PHIL HOLTSMANN, SCO

There is an error in the contract manual in Chapter 6, on page 6-3. The final paragraph on that page indicates that purchase orders may be used to order personal services costing more than \$25,000 as long as the procurement has been completed through the use of a state-wide price agreement. **This paragraph is currently incorrect.**

At the time the manual was written the Central Approver Task Force envisioned a day when the terms and conditions included in a statewide price agreement would be legally sufficient to permit purchase orders to be written for any amount against these price agreements. Unfortunately, the language in the current statewide price agreements is not legally sufficient to allow purchase orders to be written for personal services above the \$25,000 limit.

The State Controller's Office has funded a project to review and update the language contained in statewide price agreements where purchase orders can be used above the \$25,000 limit. Richard Pennington of the Attorney General's Office is currently working with the Division of State Purchasing on this project. Once this improvement to state-wide price agreements has been completed, all state agencies will be notified of the change.

# Ratification of Contracts or “Unauthorized Purchases” Under CRS 24-109-403

by **BARRY RYAN**, *Department of Law*

As you may know, the Attorney General issued an opinion on December 23, 1997 that clarified the State Controller's authority to approve state contracts that have been issued in violation of CRS 24-30-202(1) for disbursements made prior to the execution of a commitment voucher and/or in violation of CRS 24-30-202(3) for obligations incurred prior to the execution of a commitment voucher.

Subsequently, the State Controller delegated to the State Purchasing Director the authority to approve purchase orders that violate CRS 24-30-202(1) and (3) of the State Controller's statute, subject to certain conditions including compliance with the Attorney General's opinion. That delegation was “personal” to the State Purchasing Director and may not be sub-delegated. Therefore, the heads of purchasing agencies or their designees cannot approve violations of the Controller's statute. However, that personal delegation also made clear that it did not limit the CRS 24-109-403 authority of the head of a purchasing agency (or designee) to ratify solicitations and awards of contracts in violation of the *Procurement Code*.

As a result of that delegation, it may be helpful to clarify the correct legal distinction between the prohibition against ratification of certain obligations in violation of the Controller's statute, CRS 24-30-202(1) and (3) and the authority of the head of a purchasing agency to ratify violations of the *Procurement Code*, CRS 24-109-403.

The basic distinction is that CRS 24-109-403 (and its implementing Rules) **DOES NOT** authorize the head of a purchasing agency to ratify a contract, or purchase order (or an “unauthorized purchase”), where that contract/purchase order/purchase was issued in violation of CRS 24-30-202(1) (for disbursements made prior to the execution of a commitment voucher) and/or in violation of CRS 24-30-202(3) (for obligations incurred prior to the execution of a commitment voucher).

CRS 24-109-401 thru CRS 24-109-404 authorize the head of a purchasing agency to ratify a contract or purchase order made in violation of **procurement** law (CRS 24-109-403). Implementing rules at R-24-109-401 thru R-24-109-404-05 also authorize the head of a purchasing agency to ratify an “unauthorized purchase” (R-24-109-404-01), which is defined broadly to include any situation where a purchase has occurred or a purchase commitment has been made, and where:

1. the agency did not follow applicable **purchasing** requirements; or
2. the purchase or commitment was made by a person not authorized to do so. (R-24-109-401-01).

Any confusion about the correct legal distinction between these 2 statutes may be caused, in part, by the broad definition of the term “unauthorized purchase” in R-24-109-401-01. If that Rule is read by itself (*i.e.*, out of the context of CRS 24-109-403) that definition appears to include virtually any purchase, whether or not it is preceded by an appropriate commitment voucher. **But that is not the correct interpretation.** Instead, the term “unauthorized purchase” must be construed within the more limited terms of CRS 24-109-403 (as described in the following paragraph), in order for such a purchase to be capable of ratification under CRS 24-109-403 and R24-109-404-01.

Therefore, the correct interpretation of the CRS 24-109-403 ratification authority of the head of a purchasing agency is that it applies only to situations:

1. where purchases are made under a purchase order/contract that was executed pursuant to a solicitation or award, but that solicitation/award is later determined to be in violation of **procurement** requirements. For example, if an agency awarded a contract or issued a purchase order to a vendor after a competitive process, but it was later determined that a different vendor should have been selected as the low, responsive, responsible offeror, there is a violation of procurement requirements (*i.e.*, the agency selected the wrong vendor) and that pur-

## Ratification of Contracts or “Unauthorized Purchases” Under CRS 24-109-403

In such situations, an approved commitment voucher (the purchase order/contract) existed prior to the purchase, so that there was no CRS 24-30-202 issue, and the invalidity resulted solely from the solicitation/award. The head of a purchasing agency can ratify that unauthorized purchase; or

2. where supplies or services have been provided to the State without a previously executed commitment voucher, but the State has not "incurred any obligation" within the meaning of CRS 24-30-202(3). For example, if the agency does not order or request supplies or services or know that they will be provided, but such supplies or services are provided without request or order or knowledge of the State either by a volunteer or by a vendor by mistake, then the State has not "incurred any obligation" for those supplies/services within the meaning of CRS 24-30-202(3).

In such situations, an approved commitment voucher did not exist prior to the purchase, but neither had an obligation been incurred. Therefore, the head of a purchasing agency could ratify such a purchase, or could return any supplies which were unacceptable, but all such situations should be reviewed by the assistant attorney general assigned to the agency before they are ratified; or

3. that contain both a violation of **procurement** requirements and a violation of **contract** requirements, but in that case the head of a purchasing agency may ratify only the procurement violation and must forward the contract violation to the State Controller (or, if it is a purchase order, to the State Purchasing Director). For example, where a vendor is a sole source, but no formal determination was made to that effect, and the State ordered supplies/services from that vendor without a previously approved commitment voucher. Or, where there was no competitive process in circum-

stances where applicable law requires such a process, and the State ordered supplies/services from that vendor without a previously approved commitment voucher.

In such cases, the head of a purchasing agency could ratify the "sole source" or the "absence of a competitive process" aspect (or it could return any supplies unaccepted), since they are procurement violations. However, the head of a purchasing agency has no authority to also ratify the "no incurrence of an obligation without an approved commitment voucher" aspect, since that is a CRS 24-30-202(3) issue that is subject to State Controller review (if it involves a contract), or to State Purchasing Director review (if it involves a purchase order) pursuant to the State Controller's delegation.

CRS 24-109-403 ratification by the head of a purchasing agency of purchases in the 3 situations involving **procurement** requirements described above does not conflict with CRS 24-30-202(3).

However, CRS 24-109-403 ratification authority does not also apply or extend to CRS 24-30-202(3) situations, where the State makes a purchase and incurs an obligation without a purchase order/contract (or other approved commitment voucher) first being executed. In such a case the invalidity results from a violation of State **contract** requirements, and ratification of that purchase by the head of a purchasing agency does conflict with CRS 24-30-202(3). Such a situation should be referred to the State Controller for review if it involves a contract, or it should be referred to the State Purchasing Director for review (pursuant to the State Controller's delegation) if it involves a purchase order.

Be aware of this important "ratification" distinction, and contact your agency controller, or the head of the purchasing agency, or your assigned assistant attorney general with any questions or comments.

# News From the Division of State Purchasing

chase was "unauthorized".

**1. Training** - The following classes in Basic Procurement training are being offered in 1998:

- April 7 & 9, and ½ day on April 15
- May 19 & 21 and ½ day on May 27

Contact Loraine Burger to register:

e-mail: [loraine.burger@state.co.us](mailto:loraine.burger@state.co.us)

phone: (303) 866-6162

**2. "Professional Services" Change**

- The statute defining construction-related "Professional Services" (CRS 24-30-1401) was changed in 1997. Industrial hygienists have been added to the existing list of architects, engineers, land surveyors, and landscape architects.
- The procurement of "consulting services" from these construction-related professionals is exempt from the *Colorado Procurement Code*. [Thus, agencies shall NOT use a documented quote, IFB or RFP to procure "consulting services" from these professionals.] Rather, consulting services are obtained through a "qualification-based" process. Consulting services are essentially "intellectual" in nature. In contrast, the procurement of the actual construction, abatement/remediation (essentially "physical" in nature) must be done through a vendor selection process (such as the following competitive processes: DQ, IFB, RFP) authorized by the *Colorado Procurement Code*.
- Industrial hygiene is defined in the statute as: *"Practice of industrial hygiene" means the performance of professional services, including but not limited to consulting, investigating, sampling, or testing in connection with the anticipation, recognition, evaluation, and control of those environmental factors or stresses arising in*

*or from the workplace that may cause sickness, impaired health or significant discomfort to workers or the public. "Practice of industrial hygiene" includes but is not limited to the identification, sampling, and testing of chemical, physical, biological, and ergonomic stresses and the development of physical, administrative, personal protective equipment, and training methods to prevent, eliminate, control, or reduce such factors and stresses and their effects.*

- Procurements involving industrial hygiene consulting services and/or contractor services (actual abatement/ remediation) should be reviewed with agency construction project managers.
- 3. Computer Software** - Agencies are reminded to include "Year 2000" language in appropriate procurement terms and conditions. In general, when an agency is procuring computer-related goods and/or services, the agency **must** require the vendor to make the goods and/or services "Year 2000 compliant". That means that on January 1, 2000, the goods and/or software will continue to perform without problems attributable to the change in the century. This is more of a problem for databases on mainframes than PCs but, to protect your agency, the language should be included in all computer-related goods and/or service acquisitions. Acceptable language has been distributed on the Lotus Notes E-mail system. This issue is discussed in the lead article in the January 1998 Stateline.
- 4. E-mail** - People with access to Lotus Notes should check their e-mail regularly as the Division of Purchasing frequently distributes infor-

## Colorado Contract Procedures and Management Manual

[governor.state.co.us/gov\\_dir/gss/acc/contract/contract.htm](http://governor.state.co.us/gov_dir/gss/acc/contract/contract.htm)

**Privatization Review**  
**“IMPORTANT TIDBITS”**  
*by YVONNE ANDERSON, SCO*

Change and Task Orders:

Privatization review of personal services is necessary when a contract modification is made. A contract is considered to be modified when **1 or more** of the following conditions exist:

- change in the scope of services from the original contract;
- change in the dollar amount from the original contract; or
- change in term dates from the original contract.

If a change order or a task order reflects any one of the above, please forward the contract to the Department of Personnel for review.

Personal Services Annual Reporting Guidelines:

Dennis Shackleford from CSU and I are working on providing agencies with better defined guidelines for use in preparing the 1998 Annual Report. Basically, these guidelines are being developed so the annual reports will be more consistent and accurate. The guidelines will be mailed to all agencies in June. Also, watch for the guidelines in the next *CURE*!

Waiver Program:

If your agency has not taken advantage of the waiver process we have available within the Privatization Program, this may be the time to do so. If you need more information, please call Yvonne Anderson at (303) 866-2862 or you may e-mail her at (yvonne.

**An Important Note on Leases**  
**BY MICHAEL FRIEMAN, SBREP**

The strong Colorado economy combined with low mortgage interest rates has resulted in many owners of office buildings either selling their building or re-financing. When this occurs, it is routine that building lessees are asked to sign an “estoppel”, or a “subordination and attornment” agreement. Most private leases have language stating that the lessee

has ten or fifteen days to sign it and return the documents. Normally, a state lease does not contain this language. However, where estoppel agreement language has been added to the State lease, it usually contains a time frame similar to that of the private leases.

Since it is routine that these documents are dropped off at the leased premises and rarely mailed to the state agency or institution’s central office, it is important that tenants be informed that they should route such documents as quickly as possible to State Buildings and Real Estate Programs for review. For additional information, please call Michael Frieman at (303)866-2874 or fax him at (303)894-7440.

**State Fiscal Rule 3-1 “State Contracts”**  
**Rule Interpretation**

Recently the question was asked about the dollar limit that requires an agency to use a state contract rather than a purchase order when acquiring personal services.

Since this question has been asked before, the following rule interpretation was issued by the State Controller in a memorandum dated March 26, 1998:

1. State purchases that include personal services, where personal services are priced separately from commodities, for an amount less than \$25,000 **and** where the interests of the state are adequately protected, may be obligated through the use of a state purchase order. If either of these conditions are not met a state contract must be used.
2. State purchases for greater than \$25,000 must be obligated through the use of a state contract where:
  - ♦ personal services are not priced separately and are not incidental to the purchase; or:
  - ♦ the personal services amount exceeds \$25,000; or
  - ♦ the interests of the state cannot be adequately protected; or
  - ♦ the period of performance extends beyond the fiscal year.

Please remember that, in addition to the above, there are other specific types of purchases noted in State Fiscal Rule 3-1 that must be obligated through the use of a state contract.

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## CCIT MEMBERS NOTE

*Please note that our meeting will be held in Suite 1450 of the Chancery Building, located in Denver at 1120 Lincoln St. The change was made to accommodate our increased attendance.*

## Contract Management Training Update

“State Contracts 101” the Colorado Contract Management Course has been given to over 900 state employees, representing all branches of state government. To schedule your attendance or to bring the course to your state agency, please call Brad Mallon, State Training Coordinator, at (303) 866-4265.

## CCIT Meeting

Wednesday April 15, 1998

Chancery Building, Suite 1450, 1120 Lincoln St.

### Agenda

9:00-10:00	Training Update	Brad Mallon
10:00-10:15	Non-Compliant Agencies	Yvonne Anderson
10:15-10:30	Break	
10:30-10:45	Leases	Michael Frieman
10:45-11:15	Training on Warranties	Richard Pennington
11:15-11:30	Purchasing Authority	Jane Lopez